IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1437 OF 2005

WITH

CIVIL APPLICATION NO.1986 OF 2005

Smt.Parvati w/o Ishwara Pednekar ..Appellant.

Vs.

Ramesh Kalinga Lohar ..Respondent.

WITH

SECOND APPEAL NO.1436 OF 2005

WITH

CIVIL APPLICATION NO.1985 OF 2005

Sudhir Vithal Babar ..Appellant.

Vs.

Ramesh Kalinga Lohar ..Respondent.

WITH

SECOND APPEAL NO.1438 OF 2005

WITH

CIVIL APPLICATION NO.1987 OF 2005

Satish Narayan Lohar & anr. ..Appellants.

Vs.

Ramesh Kalinga Lohar ..Respondent.

WITH

SECOND APPEAL NO.1439 OF 2005

WITH

CIVIL APPLICATION NO.1988 OF 2005

Yeshwant Ganapatrao Desai,

since deceased by his legal heirs ..Appellants.

Vs.

Ramesh Kalinga Lohar ..Respondent.

WITH

SECOND APPEAL NO.1440 OF 2005

WITH

CIVIL APPLICATION NO.1989 OF 2005

Shankar Piraji Patil ..Appellant.

Vs.

Ramesh Kalinga Lohar ..Respondent.

WITH

SECOND APPEAL NO.1441 OF 2005

WITH

CIVIL APPLICATION NO.1990 OF 2005

Smt.Malubai Rangrao Ingale & anr. ..Appellant.

Vs.

Ramesh Kalinga Lohar ..Respondent.

...

Mr.Amit Borkar for the Appellants.

Mr.D.B.Patil for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD, J.

15th December, 2005.

P.C. :

1. In a suit which was instituted as far back as in 1963 for the redemption of a mortgage a preliminary decree was passed, followed by a final decree on 8th October, 2002. Upon a Second Appeal that was decided by this Court the preliminary decree stood confirmed consequent upon the abatement of the First Appeal filed to challenge that decree. The order of this Court in Second Appeal was confirmed by the Supreme Court. All the Appellants before the Court in this batch of Second Appeals are obstructionists who claim their

entitlement either through the mortgagee or from the heirs of the mortgagee and, in certain cases, from transferees from the heirs of the mortgagee. The claim of the mortgagee has been adjudicated upon. The obstructionists who claim to have acquired their interest from the judgment debtors or their successors after the date of the institution of the suit cannot obviously claim a higher right than the mortgagee. In these circumstances, for the reasons which I now propose to briefly record, I am of the view that no substantial question of law is raised in these Appeals.

2. The facts in brief are as follows :

The Second Defendant Govind Sutar had acquired the suit property on 8th April, 1949 under a registered deed of conveyance executed by the owner. On the same day, the Second Defendant mortgaged the property to the First Defendant. The Plaintiff had purchased the equity of redemption from the Second Defendant on 10th January, 1962 and instituted a suit (Regular Civil Suit 51 of 1963) for the redemption of the mortgage. The suit was

instituted against the mortgagee (the First Defendant), the mortgagor (the Second Defendant) and the purchasers from the mortgagee (the Third, Fourth and Fifth Defendants). During the pendency of the suit the question of tenancy was agitated all the way to this Court and ultimately culminated in a judgment dated 8th August, 1975 of a Learned Single Judge holding that the First Defendant had failed to establish his tenancy. A preliminary decree was passed in the suit on 17th March, 1976. This was challenged by Defendants 3 to 5 in which the First Appellate Court remanded the proceedings back to the Trial Court. Once again the Trial Court passed a preliminary decree on 16th April, 1984. The preliminary decree came to be challenged by Defendants 3, 4 and 5 in a First Appeal (First Appeal 132 of 1984). The mortgagee had expired in 1972 and it is common ground that his heirs, Respondent No.1(a) and Respondent 1(e) respectively expired on 23rd June, 1988 and 31st August, 1986 during the pendency of the First Appeal. The First Appeal had therefore abated. Despite this, an order of remand was passed in the First Appeal on 30th April, 1993 which was challenged before this Court by the decree holder in Second Appeal 591 of

1994. On 18th December, 2001 a Learned Single Judge of this Court decided the Second Appeal and held thus :

> "It would therefore be crystal clear that in the absence of the legal heirs and representatives of the deceased parties in the first appeal, the judgment and order given in the said first appeal is vitiated as the appeal itself stood abated and there was no judgment and order in the eyes of the law. If this is so the present second appeal against the said judgment and order in the first appeal also stands abated. The effect of abatement of both these appeals has also been clearly laid down by the Supreme Court that the order of the trial Court acquires finality. I am therefore in agreement with Shri.Patil's submission that the effect of abatement of both these appeals would be to hold and declare that the judgment and order of the trial court acquires finality as challenge to the said judgment and order has failed on account of abatement of the appeals.

> The said judgment of the trial court has remained intact and all concerned will have to abide by the same in every respect. The net result of the second appeal is that it fails as it has abated as aforesaid and the judgment and order of the Trial Court passed on 16.2.1984 acquires finality."

3. A review was filed before this Court contending that the Second Defendant who was the original mortgagor had expired on 30th March, 1976 and that in his absence the Second Appeal must be regarded also as having abated. On 25th July, 2002 the Review Petition was dismissed with the observation that the Plaintiff had stepped into the shoes of the mortgagor (the Second Defendant) and no relief had been claimed against the Second Defendant. The Second Defendant had not appeared in the suit or defended the same. He had not contested the suit or the appeal. In the circumstances, it was not even necessary to implead the Second Defendant and the decree therefore could not be held to be vitiated. The order of this Court in the Second Appeal was challenged before

the Supreme Court and it is common ground between the learned counsel appearing for both the parties that the Special Leave Petition was dismissed. Following the judgment of this Court in the Second Appeal, a final decree came to be passed on 8th October, 2002 in the suit for redemption and it has been stated that the challenge preferred thereto by Defendants 3 to 5 has also been disposed of.

4. On these facts, two principal submissions have been urged on behalf of the Appellant. The first submission is that the decree which was passed by this Court in the Second Appeal was without jurisdiction and it was urged that a decree without jurisdiction, being a nullity, can be challenged in any other proceedings. There is no merit in the submission. The Appellants are, as already noted earlier, persons who claim through the mortgagee or, as the case may be, heirs or transferees from the heirs of the mortgagee. There is a final decree which has been passed against the mortgagee. The Appellants cannot therefore assert any higher right. It is impossible to hold that the decision rendered in the Second Appeal is a nullity. The First Appeal that was filed against

the preliminary decree dated 16th April, 1984 stood abated upon the death of Respondent No.1(e) who expired on 31st August, 1986 and Respondent NO.1(a) who expired on 23rd June, 1988, both of them being the heirs of the original mortgagee. This was so held by the Learned Single Judge of this Court in paragraph 5 of the judgment dated 18th December, 2001 which has already been extracted earlier. The contention that there was an abatement of the Second Appeal on the ground that the Second Defendant who was the mortgagor had expired in 1986, was dealt with in a Review Petition before this Court and the categorical finding was that the Plaintiff had stepped into the shoes of the original mortgagor who was a formal party and who had in any event not even defended the proceedings. Hence, there is no merit in the first submission.

5. The second submission is that the sale deed in favour of the obstructionists is void and that accordingly the obstructionists must be deemed to have become owners by adverse possession. In Dilboo (Smt) (Dead) By LRs. v. Dhanraji (Smt.)(Dead) (2000) 7 SCC 702, the Supreme Court held that when an interest in excess of the

interest of the mortgagee is created then the third party is not claiming under the mortgagee. The position of such a person could not be worse than that of a rank trespasser who is in an open and hostile possession and as the title of the rank trespasser would get perfected by adverse possession on the expiry of 12 years so also the title of such transferee would get perfected after 12 years. The dictum which has been laid down in the aforesaid decision cannot come to the aid of the Appellants who admittedly seek to have acquired their interest after the date of the institution of the suit either from the mortgagee or his heirs or transferees, as the case may be. The interest it may be noted is in respect of a portion of the mortgaged property. The Appellants cannot set up a right which is wider in nature than the mortgagee to prove their claim.

4. Both the Courts below have elaborately dealt with all the objections of the obstructionists and having done so have, in my view, correctly come to the conclusion that there is no merit in the objections. The decree holder is, in my view, justifiably entitled to the fruits

of the decree in a suit which was instituted 42 years ago. The Second Appeals are dismissed.

In view of the disposal of the Appeals, the Civil Applications are rendered infructuous and are accordingly disposed of.

Stay refused.